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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JORDAN PELEG, Plaintiff and Respondent, v. LOS ANGELES FILM SCHOOL, Defendant and Appellant.	2d Civil No. B291849 (Super. Ct. No. BC685342) (Los Angeles County)

Los Angeles Film School (LAFS) appeals the trial court's order denying its motion to compel arbitration of respondent Jordan Peleg's claims related to his enrollment as a student at LAFS. LAFS contends the trial court erred because respondent did not meet his burden to demonstrate that the parties' arbitration agreement was unconscionable and the product of a unilateral mistake. We agree and reverse.

Facts

Respondent's complaint alleges that, in August 2016, he and his mother toured the LAFS campus. The admissions representative with whom they met made a number of representations regarding the school. The representative allegedly told respondent that: each class meets for a single one-month "'term;'" classes meet five days a week for about six hours a day; the professors are currently employed in the film industry; respondent would be guaranteed an internship in the film industry; LAFS offers both associates and bachelors degrees; and credits earned at LAFS can be transferred to other schools. Respondent alleges that he relied on these representations when he decided to enroll in LAFS.

The day before classes were scheduled to begin, respondent, along with about 20 other prospective students, was directed to a room and instructed to sign an enrollment contract presented on a touch screen computer. Respondent alleges he was told he would not be permitted to enroll in classes unless he signed the contract. He would, instead, have to wait for the next semester to enroll. Respondent alleges that he also felt rushed to sign quickly because other students were waiting. Respondent signed the enrollment agreement. He also signed a separate document entitled Binding Arbitration Agreement and Waiver of Jury Trial. He did not receive a copy of the agreements, either in paper or digital form.

Within a few weeks, respondent became dissatisfied with the weekly number of class hours being offered at LAFS. In January 2017, respondent asked about an internship and was allegedly told he would be eligible for placement after 10 months. When he had been enrolled for 10 months, he asked again about

an internship. The complaint alleges, "He was told LAFS offered no such service."

LAFS rejected respondent's demand for a tuition refund. Respondent filed his complaint. LAFS moved to compel arbitration. The trial court denied the motion without hearing any live testimony or issuing a statement of decision. Its minute order states only, "Defendant's motion to compel arbitration is called and argued. [¶] The motion is denied. The Court finds the arbitration agreement in [sic] unenforceable."

The Enrollment and Arbitration Agreements

Paragraph 19 of the enrollment agreement, which appears on the agreement's final page just above a signature line, addresses arbitration. Entitled "**ARBITRATION**," the paragraph states, "Student agrees and understands that any dispute arising out of or related to his or her enrollment at the Institution will be resolved by final and binding arbitration under the laws of California as set forth in the attached arbitration agreement which is hereby expressly incorporated into this agreement."

The arbitration agreement is a separate 3 page document. It begins with a text box stating: "*NOTICE OF ARBITRATION AGREEMENT* [¶] The accompanying Binding Arbitration Agreement and Waiver of Jury Trial provides that all disputes between you and [LAFS] will be resolved by **BINDING ARBITRATION**." The following bullet points inform signer, "You thus **GIVE UP YOUR RIGHT TO GO TO COURT** to maintain any court action . . . . [¶] Your rights will be determined by a **NEUTRAL ARBITRATOR** and **NOT** a judge or jury, and you are expressly and knowingly waiving your right to a trial before a judge or jury. [¶] You are entitled to a **FAIR**

HEARING, BUT the arbitration procedures may be **SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT.** [¶] You agree that, by entering into this Arbitration Agreement, you are waiving the right to trial by jury or to participate in a class action or class arbitration. **Arbitrator decisions are as enforceable as any court order and are subject to VERY LIMITED REVIEW BY A COURT.**"

The first numbered paragraph of the agreement reiterates that the parties "agree to arbitrate **all disputes, controversies and claims** between us." This includes, "claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory, including, without limitation, claims relating to (i) the Enrollment Agreement; (ii) the recruitment of you and/or your enrollment, attendance, or education at LAFS; (iii) financial aid or career service assistance by LAFS; (iv) any claim by either party, no matter how described, pleaded or styled, relating, in any manner, to any act or omission regarding your relationship with LAFS, its employees, or with externship sites or their employees[.]" It also includes, "any objection to arbitrability or the existence, scope, validity, construction or enforceability of this Agreement[.]"

Contentions

LAFS contends the trial court erred when it declined to compel arbitration because respondent's claims fall within the scope of the arbitration agreement and the agreement is not unconscionable or the product of a unilateral mistake. Respondent contends the arbitration agreement is unconscionable. He contends the agreement is procedurally unconscionable because respondent was required to sign it as a

condition of enrollment, he was not able to negotiate the terms of the arbitration agreement and was not given time to review the agreement with his mother. The agreement is substantively unconscionable, according to respondent, because the enrollment agreement, of which it is a part, gives LAFS the unilateral right to modify its terms without notice.

Standard of Review

"The interpretation of an arbitration provision 'is solely a judicial function unless it turns upon the credibility of extrinsic evidence; accordingly, an appellate court is not bound by a trial court's construction of a contract based solely upon the terms of the instrument without the aid of evidence.' [Citations.] Where, as here, the language of an arbitration provision is not in dispute, the trial court's decision as to arbitrability is subject to de novo review. [Citation.]" (*Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 771; see also *Hyundai Amco America, Inc. v. S3H, Inc.* (2014) 232 Cal.App.4th 572, 576.)

The question at issue here is whether the arbitration agreement is unconscionable and therefore unenforceable. "Unconscionability is ultimately a question of law, which we review de novo when no meaningful factual disputes exist as to the evidence." (*Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 708; see also *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1562 (*Malone*).)

Adequate Record on Appeal

The record on appeal consists solely of an appellant's appendix. There is no reporter's transcript. Respondent contends the record is not adequate to permit review of the trial court's decision. We disagree.

As a general rule, the judgment of the trial court is presumed on appeal to be correct; error is never presumed. LAFS has the burden of overcoming this presumption by showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.) Without a reporter's transcript of trial proceedings or evidentiary hearings, LAFS cannot challenge the sufficiency of the evidence to support the order. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186.) "Failure to provide an adequate record on an issue requires that the issue be resolved against [LAFS]." (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

LAFS's failure to provide a reporter's transcript does not prevent our review of the trial court's decision to deny its motion to compel arbitration. No live testimony was taken at the hearing on LAFS's motion. All of the documents on which the trial court relied are included in the record. We also review the trial court's order de novo, relying on the same evidence it considered. The present record is adequate for that review.

Discussion

Unconscionability

""The right to arbitration depends on a contract. [Citations.] Accordingly, a party can be compelled to submit a dispute to arbitration only where he has agreed in writing to do so. [Citation.]' [Citation.] In a motion to compel arbitration, 'the party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense, such as unconscionability. [Citations.]' [Citations.]" (*Serafin v. Balco*

Properties Ltd., LLC (2015) 235 Cal.App.4th 165, 172-173 (*Serafin*).)

"Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. [Citations.] Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be 'so one-sided as to "shock the conscience."' [Citation.]" (*Pinnacle Museum Tower Assn v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 246 (*Pinnacle Museum Tower Assn*).)

Respondent contends, and the trial court impliedly found, the arbitration agreement is unconscionable because: he was required to sign it as a condition of enrollment; was unable to review the agreement with his mother or counsel; and had no meaningful choice about whether to sign the agreement or about its terms. These circumstances indicate that the arbitration agreement is a contract of adhesion, but do not establish its unconscionability. The fact that a contract is adhesive, e.g., that it is imposed and drafted by the party with superior bargaining power, is not alone sufficient to render it unconscionable. (*Malone*, *supra*, 226 Cal.App.4th at p. 1561; *Sanchez v. Carmax Auto Superstores California, LLC* (2014) 224 Cal.App.4th 398, 402.)

None of the other common hallmarks of procedural unconscionability are present here. First, respondent's declaration does not establish that he was subject to any

significant oppression. He was told that he had to sign the arbitration agreement to complete his enrollment at LAFS. If he did not sign, he would have to wait until the next semester to start classes. Respondent could have chosen to wait, or he could have chosen to attend a different school. He was not threatened with the withdrawal of his acceptance at LAFS, much less with the loss of a job. (See, e.g., *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, [arbitration agreement unconscionable where prospective employee was told offer of employment would be withdrawn if she did not sign]; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231 [arbitration agreement unconscionable where employee feared loss of job if she did not sign].)

Second, respondent did not establish that the arbitration agreement was a surprise. (*Zullo v. Superior Court* (2011) 197 Cal.App.4th 477, 484 ["'Surprise' involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms"].) The arbitration agreement was not hidden in the documents digitally presented to respondent. It is a separate document that plainly stated, in bold-face type, the rights prospective students were being asked to waive. The agreement also identified the arbitration forum and provided instructions for obtaining a copy of the applicable arbitration rules and for filing a claim against LAFS.

Respondent also failed to establish that the arbitration agreement is substantively unconscionable. "'The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create "'overly harsh"' or "'one-sided"' results as to "'shock the

conscience.'" [Citations.]' [Citations.]" (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1288-1289.)

Respondent contends the agreement is substantively unconscionable and illusory because it grants LAFS the unilateral right to modify the agreement without notice to respondent. We disagree. A unilateral power to modify is not, in the absence of other one-sided, inequitable terms, sufficient to render a contract substantively unconscionable. (*24 Hour Fitness*, *Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213-1214.) LAFS's "discretionary power to modify the terms of the [enrollment agreement] . . . indisputably carries with it the duty to exercise that right fairly and in good faith. [Citation.] So construed, the modification provision does not render the contract illusory." (*Id.* at p. 1214; see also *Serafin*, *supra*, 235 Cal.App.4th at p. 176.)

Unilateral Mistake

In his opposition to the motion to compel, respondent contended the enrollment and arbitration agreements were based on a unilateral mistake by LAFS regarding which state's law governs their interpretation.[1] On appeal, LAFS refers to the inconsistency between the agreements as a typographical error and disclaims any mistake. Respondent has not renewed this argument on appeal. Had he done so, we would reject it. A contract may be rescinded where "the consent of the party rescinding . . . was given by mistake." (Civ. Code, § 1689.) LAFS,

[1] The enrollment agreement provides that it will be interpreted under California law, but incorporates by reference the arbitration agreement, which provides that it will be interpreted according to federal law and the law of Florida.

the purportedly mistaken party, seeks to enforce its contract, not rescind it. The defense has no application here.

Moreover, a contract may be rescinded for unilateral mistake only where, among other things, enforcement of the contract would be unconscionable. (See, e.g., *Erickson v. Aetna Health Plans of California, Inc.* (1999) 71 Cal.App.4th 646, 658-659.) Respondent did not carry his burden to prove the arbitration agreement was unconscionable. (*Pinnacle Museum Tower Assn.*, *supra*, 55 Cal.4th at p. 247.)

Disposition

The order denying the motion to compel arbitration is reversed. The trial court shall enter a new order granting the motion. Costs to appellant.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Michael L. Stern, Judge

Superior Court County of Los Angeles

Tucker Ellis, Matthew I. Kaplan and Ryan Evans for Defendant and Appellant.

The Bensamochan Law Firm and Eric Bensamochan for Plaintiff and Respondent.